No. 04-2353

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CYNTHIA E. CANADY ET AL.,

Plaintiffs-Appellants,

v.

FEDERAL INSURANCE COMPANY, ET AL.,

Defendants-Appellees.

BRIEF OF PLAINTIFFS/APPELLANTS

On Appeal from the United States District Court
for the Western District of Missouri (Kansas City)
(Civil No. 97-1141-CV-W-2)
The Honorable Fernando J. Gaitan Jr.
United States District Judge

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I. SUMMARY OF THE CASE

Plaintiffs challenged defendants' discriminatory practices, in violation of the Fair Housing Act, 42 U.S.C. §3601 *et. seq*. ("FHA"); the Civil Rights Act of 1866, 42 U.S.C. §1981 ("§1981"); and the Civil Rights Act of 1870, 42 U.S.C. §1982 ("§1982") in the court below. In their corrected revised second amended complaint, plaintiffs alleged that their knowledge of the defendant's discriminatory practices deterred them from applying with the defendant for homeowners insurance and that they would apply for insurance with the defendant upon the elimination of these practices. The court below committed reversible error when it dismissed plaintiffs' deterrence claims for lack of standing because they did not demonstrate that they acquired knowledge of defendants' discriminatory policies through direct contact with defendants' agents.

Plaintiffs request fifteen minutes of oral argument. Although this case was dismissed for lack of standing at the pleadings stage, elucidation of its procedural history, the facts supporting plaintiffs' standing and relevant precedent is required and therefore, oral argument is warranted.

II. JURISDICTIONAL STATEMENT

This action arises from plaintiffs' August 12, 1997 complaint, filed in the United States District Court for the Western District of Missouri

("district court"), alleging that defendants Federal Insurance Company, Pacific Indemnity Insurance Company, Sea Insurance Company of America, Sun Insurance Office of America, Inc. and Vigilant Insurance Office of America, Inc. (collectively "Chubb"), subjected them to discriminatory practices with respect to the marketing, underwriting, sale and pricing of homeowners insurance in violation of the FHA, §1981 and §1982.[1] JA-1; JA-36:221.[2]

This Court's jurisdiction is vested pursuant to 28 U.S.C. § 1291. Plaintiffs appeal the district court's final Order of March 26, 2004 ("Order"), dismissing plaintiffs' claims in their entirety for lack of subject matter jurisdiction.

Plaintiffs filed their Notice of Appeal on April 22, 2004, within the thirty-day period prescribed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. R-52.

[1] Plaintiffs are not pursuing their claims brought pursuant to the Missouri Human Rights Act, R.S. Mo. §213.041 in this appeal.

[2] Plaintiffs citations throughout this brief are as follows: Joint Appendix - "JA-Docket Entry: Page Number(s)" and Record Citations – "R-Docket Entry: Page Number(s)."

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed reversible error by dismissing plaintiffs' complaint for lack of standing because they did not allege "direct contact" with Chubb agents.

- *Steger v. Franco, Inc*., 228 F.3d 889, 892 (8th Cir. 2000)
- *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982)
- *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)
- *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137-38 (9th Cir. 2002)

2. Whether the district court committed reversible error by failing to evaluate plaintiffs' standing from the time plaintiffs filed their corrected revised second amended complaint.

- *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81 (2000)
- *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991)
- *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982)
- *Perry v. Village of Arlington Heights*, 186 F.3d 826 (7th Cir. 1999)

3. Whether the district court committed reversible error by dismissing plaintiffs' claims pursuant to Rule 12(b)(1) without providing notice that it would require plaintiffs to submit evidence demonstrating their standing.

- *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982)
- *McCulloch v. Velez*, 364 F.3d 1, 7 (1st Cir. 2004)

- *Fair Housing Council of Sub. Philadelphia v. Montgomery Newspapers* 141 F.3d 71, 74 (3d Cir. 1998)

IV. STATEMENT OF THE CASE

Although the instant litigation has been protracted, it has gone no further than the initial pleadings stage. After almost seven years, plaintiffs remain at the courthouse door seeking to test the merits of their claims. On August 12, 1997, plaintiffs filed their complaint against defendant Chubb, alleging, *inter alia*, that Chubb engaged in discriminatory practices with respect to marketing, underwriting, sale and pricing of homeowners insurance in violation of the FHA, §1981 and §1982. R-1. Plaintiffs requested declaratory, injunctive and monetary relief individually, and on behalf of other persons similarly situated. *Id*.

At the time plaintiffs filed their original complaint, a related case involving plaintiffs, Chubb and others was pending before this Court. *See Canady v. Allstate Ins. Co.*, 162 F.3d 1163 (8th Cir. 1998) ("*Canady I").* The parties moved to stay the proceedings and the district court granted the parties' motions. R-7; R-9; R-12. The stay was temporarily lifted on January 25, 1999, following this Court's decision in *Canady I.* R-13. On March 1, 1999, plaintiffs filed a first amended complaint and the parties proceeded with this case in the district court. R-15 to R-21. Shortly thereafter, however, proceedings again were stayed pending the disposition

of a consolidated appeal in two other related cases involving the plaintiffs, Chubb and others, *Canady v. Allstate, Ins. Co*., 282 F.3d 1005 (8th Cir. 2002) ("*Canady II*"). JA-23.

Following this Court's March 8, 2002 decision in *Canady II*, plaintiffs moved to lift the stay in the instant case and for leave to amend to conform their complaint with this Court's mandates in both *Canady I* and *Canady II*. JA-27:1-4. On September 30, 2002, the district court granted plaintiffs' motion to lift the stay. JA-33:61-66. The district court denied plaintiffs' motion to file their second amended complaint as proposed, stating that "plaintiffs must at least prove that they had *knowledge* of the defendants' discriminatory policies and… that through this direct contact with defendants, [they] knew that it would be futile to apply for insurance…" (emphasis added). JA-33:63-64. However, the district court invited plaintiffs to file a "revised" second amended complaint consistent with its September 30, 2002 Order. *Id*. at 64-65.

On October 29, 2002, plaintiffs filed their Corrected Revised Second Amended Complaint ("second amended complaint"). JA-37. Plaintiffs alleged, *inter alia*, that

> [B]arriers that Chubb has erected to obtaining homeowners insurance… caused… plaintiffs… who have experienced or otherwise acquired knowledge of those barriers, to conclude that attempts to acquire insurance from Chubb would be futile. Chubb thus deterred

> and discouraged these persons from attempting to purchase insurance from Chubb.

Id. at 73.

Chubb moved to dismiss plaintiffs' second amended complaint for lack of standing. JA-40:83. Chubb argued that its motion to dismiss should be considered a "factual" challenge to plaintiffs' complaint and requested "the opportunity to bring the relevant materials [outside of the pleadings] to the attention of the court either by evidentiary hearing or some other 'rational mode of entry.'" JA-41:96. Chubb challenged plaintiffs' second amended complaint by arguing

> ten plaintiffs "allege neither contact with Chubb nor knowledge of Chubb's underwriting guidelines" and the other three plaintiffs could not establish standing because they did not have contact with Chubb until after the filing of the original complaint.

Id. at 97, 102. Plaintiffs responded to Chubb's motion, but certainly anticipated notice from the district court as to whether it would consider matters outside of the pleadings and if so, the time and manner plaintiffs should submit supporting evidence. JA-43. Plaintiffs contended in their response, however, that the arguments Chubb advanced in their motion to dismiss were patently flawed and therefore testing plaintiffs' complaint beyond the allegations would prove unnecessary because standing was evident. JA-43:193.

On March 26, 2004, without notice that it would test the veracity of plaintiffs' allegations with respect to standing and without providing plaintiffs the opportunity to submit evidence supporting their standing, the district court dismissed plaintiffs' second amended complaint with prejudice for lack of subject matter jurisdiction. JA-49. In dismissing plaintiffs' claims, the district court held plaintiffs could acquire knowledge of Chubb's discriminatory practices *only* through direct contact with a Chubb agent. JA-49:200 (emphasis added). Although three plaintiffs specifically alleged they had direct contact with Chubb agents (*see* p. 8, *infra*), the district court did not consider these allegations because they were not made in the original complaint. *Id*. at 201.

Plaintiffs appeal the decision of the district court. Plaintiffs seek reversal of the March 26, 2004 Order and remand for discovery proceedings because the district court committed reversible error by: (1) holding that plaintiffs could establish standing to bring deterrence claims *only* by demonstrating "direct contact" with Chubb agents; (2) holding that plaintiffs' standing must be evaluated at the time plaintiffs filed their original complaint; and (3) dismissing plaintiffs' claims without allowing plaintiffs to submit supporting evidence of their standing.

V. STATEMENT OF FACTS

Plaintiffs, with the exception of Coleman and Evalin McClain, are Black citizens of Kansas City, Missouri, who reside and/or own residential property in a contiguous area consisting of 1990 and 2000 Census Tracts where the resident Black population exceeds sixty percent ("the community"). JA-37:66-67. The McClains reside and own a home within Census Tract 23, which is immediately adjacent to the community. JA-37:70. In 2000, the Black population in the McClains' Census Tract was 51.2 percent. *Id*.

On August 12, 1997, plaintiffs filed lawsuits against Chubb and eight other homeowners insurance companies alleging discrimination in violation of the FHA, §1981 and §1982. R-1. Plaintiffs filed a second amended complaint in this case on October 29, 2002. JA-37. In the second amended complaint, plaintiffs alleged that

> Chubb's use of statewide objective underwriting selection criteria… preclud[ed] plaintiffs from qualifying for homeowners insurance… [and] because their homes did not meet these… criteria… it would have been futile for plaintiffs to apply for such coverage… as plaintiffs Ester Moten, Mischelle Greer and Marva Saunders all found out when they recently called several independent Chubb agents in Kansas City.[3]

[3] Among the objective criteria were minimum value requirements of $50,000 for "standard" coverage for Federal, $125,000 for "preferred" coverage from Vigilant, $200,000 for "most preferred" coverage from Pacific Indemnity, and [at the time of the filing of the second amended complaint] $500,000,

> Chubb's use of … primarily white independent agent[s]… and/or it[s] in-house underwriting staff… would likely result in the denial of coverage to plaintiffs…
>
> Chubb has deterred and discouraged these persons from attempting to purchase insurance from Chubb. Plaintiffs seek the opportunity to purchase homeowners coverage offered by Chubb; however, Chubb's discriminatory policies and practices have prevented and continue to prevent them from obtaining such coverage.

JA-37:72-73. Plaintiffs claimed that Chubb's conduct was actionable under both disparate impact and disparate treatment methods of proof. *Id*.

The district court dismissed the case at the initial pleadings stage. The premature and unexpected dismissal precluded plaintiffs from presenting additional evidence in support of subject matter jurisdiction and conducting full discovery.

VI. SUMMARY OF THE ARGUMENT

The district court committed reversible error by dismissing plaintiffs' FHA, §1981 and §1982 claims against Chubb with prejudice for lack of standing. First, the district court erred by requiring plaintiffs' claims to satisfy the "injury-in-fact" requirement of standing by demonstrating ***direct contact*** with Chubb agents. While direct contact with Chubb agents is one

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$650,000 or $750,000 (depending on which agent is asked) for [the] Chubb "masterpiece" policy, that were satisfied by few homes in the community. JA-37:72

method by which plaintiffs may obtain knowledge of Chubb's discriminatory practices, plaintiffs should not have been *limited* to demonstrating knowledge in this manner. Plaintiffs satisfied the injury-in-fact requirement by alleging that they knew of Chubb's discriminatory practices and would have applied for homeowners insurance with Chubb, but for those practices. Plaintiffs satisfied all other requirements for standing. Indeed, Chubb has not challenged, and the district court has not ruled that any plaintiff has failed to satisfy the other standing requirements.

Second, the district court erred by failing to consider the "direct contact" allegations of three plaintiffs because the allegations were not included in the original complaint. Relevant Supreme Court precedent dictates that standing be assessed at the time plaintiffs filed their second amended complaint.

Finally, the district court committed error by dismissing plaintiffs' complaint pursuant to FRCP 12(b)(1) without adequate notice to plaintiffs and without allowing plaintiffs to submit additional evidence demonstrating their standing. The district court never informed plaintiffs that it would test the veracity of their allegations and require them to present additional evidence at the pleading stage. Had they been alerted to the need to do so, plaintiffs would have submitted declarations or affidavits describing their

knowledge of Chubb's practices and their intent to contact Chubb about the possibility of obtaining insurance once discriminatory barriers were removed.

Because plaintiffs' second amended complaint alleged sufficient facts to demonstrate standing, plaintiffs appeal the March 26, 2004 Order of the district court. Plaintiffs respectfully request that this Court reverse the district court's Order and remand this case for discovery and further proceedings.

VII. ARGUMENT

A. Standard of Review

The United States Court of Appeals for the Eighth Circuit reviews the dismissal of a complaint for lack of subject matter jurisdiction *de novo*. *Brotherhood of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001).

B. Plaintiffs Sufficiently Alleged Facts Demonstrating Their Standing in The Second Amended Complaint

The district court committed reversible error by dismissing plaintiffs' second amended complaint with prejudice for lack of standing. To demonstrate standing under Article III of the Constitution, a plaintiff must show:

> (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision.

Steger v. Franco, Inc., 228 F.3d 889, 892 (8th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An injury-in-fact, the first requirement, "is a harm that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. (quoting Lujan, 504 U.S. at 560); *accord*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81 (2000). Standing under the FHA is as broad as under Article III. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Courts have created two additional prudential standing requirements for claims under §1981 and §1982. Chubb has argued, and the district court agreed that plaintiffs failed to meet only one of the standing requirements – injury-in-fact. The district court was wrong.

1. All plaintiffs have suffered actual or imminent harm from Chubb's discriminatory practices.

This Court in *Steger* made clear what plaintiffs must show to satisfy the injury-in-fact requirement. The five plaintiffs in *Steger* sued to compel the defendant to bring one of its buildings into compliance with the Americans with Disabilities Act. This Court affirmed the district court's

ruling that four of the plaintiffs lacked standing. They had never visited the building before filing the lawsuit, but that was not determinative. This Court made clear that the crucial facts were that they had not shown that they had knowledge of the existence of illegal barriers before filing the lawsuit and that they had not shown an intent to access the building at any time in the future. *Steger*, 228 F.3d at 893. As the Court said, "they must at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers." *Id.*

The Court reversed the district court as to the fifth plaintiff, Patrick Burch, who was blind. Burch had visited the building and been unable to locate a restroom because the building's first floor common area did not contain ADA-compliant signage. *Id.* Through this contact, he had acquired knowledge of the violation, and his inability to use the facilities constituted "actual injury." *Id.* Although Burch was unaware of other barriers to blind persons in the building, he had standing to challenge all such barriers, not just the inadequacy of the restroom signage. *Id.* at 893-94.

Other courts follow *Steger* in requiring knowledge of the violation and either actual harm or an intent to use the facility or services of the defendant once the violation is removed. *See, e.g., Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137-38 (9th Cir. 2002) (holding that plaintiff has

standing to sue owner of grocery store because "he has actual knowledge of the barriers to access … and [] he would shop [there] if it were accessible"); *Disabled in Action v. Trump Int'l Hotel & Tower*, 2003 U.S. Dist. LEXIS 5145, at *19-31 (S.D.N.Y. Apr. 2, 2003) (citing numerous cases).[4]

The district court in the instant case erred by transforming an isolated fact – that Burch had visited the building while the other *Steger* plaintiffs without standing had not – into a legal principle. This erroneous conversion overstates the relevance of this fact. Nothing in *Steger* hints at direct contact with the defendant as being the only way in which a plaintiff alleging deterrence can establish knowledge of the defendant's practices. Indeed, the district court's decision is at odds not only with *Steger*, but with an entire line of cases addressing deterrence claims. Federal appellate courts have identified several acceptable methods to acquire knowledge for a deterrence claim in addition to direct contact. *See, e.g., EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1274-75 (11th Cir. 2002) (deterred applicants established knowledge of unlawful policies and practices based on testimony that they were told by acquaintances that defendant did not hire women); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990)

[4] This case is unpublished, however plaintiffs believe that it will be helpful to the Court. A full copy of the opinion is attached in appellants' addendum, pursuant to Local Rule 28A(i).

(deterred home purchaser established knowledge of defendant cooperative home association's unlawful policies and practices "through real estate agent with no official ties to [defendant]"); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984) (deterred applicants may establish knowledge of defendant's unlawful policies and practices based on previous discriminatory experience that took place outside of limitations period). Thus, plaintiffs who did not have direct contact with the defendants prior to the filing of the complaint nevertheless could have standing if they otherwise acquired knowledge of Chubb's discriminatory practices.

Injury-in-fact, like the other standing elements, does not have to be pled with particularity. *See Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224, 233 (6th Cir. 2003) (*citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions.")). Three plaintiffs allege that they, like Burch in *Steger*, acquired the knowledge through a direct contact with Chubb agents. The others do not allege such direct contacts, but they nevertheless allege knowledge. As in *Steger*, they do not need to allege knowledge of every one of Chubb's discriminatory practices in order to have standing to challenge them. To require knowledge of all discriminatory practices would be to create "piecemeal compliance" and "inefficient,"

"impractical" litigation. *Steger*, 228 F.3d at 894; *accord Pickern*, 293 F.3d at 1138.

Injury-in-fact, under *Steger*, also requires either actual harm or an intent to use the defendants' facilities or services after the cessation of the practices blocking their use. All plaintiffs allege that they have been deterred in the past from seeking insurance from Chubb because of their knowledge of the discriminatory barriers. JA-37:72-73. It would have been absolutely futile, for example, to seek insurance with Federal Insurance Company if their houses had a value of under $125,000. *See, e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (persons deterred from applying for employment where employer has clearly established "Whites Only" policy have standing); *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) (even though they have not applied for licenses, midwives have standing to challenge requirement for certification when application would be futile). The plaintiffs were harmed by having to obtain inferior insurance.[5] *See also Meese v. Keene*, 481 U.S. 465, 473 (1987) (affidavit stating that plaintiff "was deterred from exhibiting [his] films" was sufficient to establish

[5] By contrast, the four *Steger* plaintiffs without standing did not show that they had been deterred from visiting the building before the complaint had been filed because they had not even shown knowledge of the barriers.

standing); *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999) (showing that the challenged regulation deterred plaintiffs from speaking was sufficient to establish standing).

Even if the Court concludes that the plaintiffs had not shown actual injury, they have sufficiently alleged an intent to contact Chubb about insurance once the illegal practices are eliminated. As homeowners, plaintiffs need insurance every year. There are a limited number of licensed insurers in the State of Missouri. It is in their economic interest to shop for the best insurance deal each year.

These indisputable facts distinguish this case from the circumstances of the four plaintiffs without standing in *Steger*. The building at issue in that case, located in a St. Louis suburb, provided office and retail space for health care providers and other retail and service establishments, including the café that Burch visited. None of the *Steger* plaintiffs showed any need or economic reason to visit the building. Presumably hundreds if not thousands of buildings in the St. Louis metropolitan area housed similar establishments. The *Steger* plaintiffs had no periodic reason to visit such establishments, as plaintiffs have each year as their insurance policies expire.

These facts also distinguish this case from other cases in which standing was not found to challenge alleged statutory or constitutional violations[6] because of failure to show imminent harm, as set out in great detail in *Disabled in Action*, 2003 U.S. Dist. LEXIS 5145, at *25-28. None of the plaintiffs in those cases could allege that they would contact the defendant, in the near future, to use its services if illegal barriers were removed.[7]

Accordingly, the district court erred in concluding that plaintiffs had not adequately alleged injury-in-fact. They did not need to show that they acquired knowledge of Chubb's discriminatory practices through direct contact. Plaintiffs satisfied the "injury in fact" requirement of standing by

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[6] In numerous cases, courts have stated that the standing standard is met if the plaintiff is "able and ready" to avail himself of a benefit on once the discriminatory barrier is removed. *E.g. Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). If that standard is applied, plaintiffs have alleged sufficiently that they are able and ready to obtain homeowners insurance Chubb.

[7] This point is further illustrated by comparing the Supreme Court's rationale in *Lujan*, where plaintiffs did not have standing, with the rationale in *Laidlaw*, were plaintiffs established standing. In *Lujan*, the Supreme Court determined that the plaintiffs did not have standing because their plans to return "some day" to observe endangered species on an "unspecified" tract of land, halfway around the world were not sufficiently "concrete" to satisfy the imminent injury-in-fact requirement. *Lujan*, 504 U.S. at 564. Conversely, in *Laidlaw*, the Supreme Court held the plaintiffs established standing because they asserted that the defendant's conduct directly effected their recreational, aesthetic and economic interests in that they were geographically near the body of water subjected to pollution and were likely to use it often. *Laidlaw*, 528 U.S. at 183.

alleging that they knew of Chubb's discriminatory practices, were interested in obtaining insurance from Chubb, but did not apply for insurance because they knew it would be futile to do so.

2. The district court was required to evaluate standing at the time plaintiffs filed the second amended complaint.

The district court ignored three plaintiffs' "direct contact" allegations because they did not assert them in the original complaint. JA-49:201-202. This was contrary to Supreme Court precedent. The Supreme Court has clearly stated that standing is to be assessed under the facts existing when the "complaint" is filed. *Laidlaw*, 528 U.S. at 184; *Lujan*, 504 U.S. at 560 n.4. The same is true with respect to an amended complaint. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (evaluating standing based on facts existing "at the time the Second Amended Complaint was filed"); *Havens*, 445 U.S. at 377 (mandating that plaintiffs be afforded the opportunity to amend complaint to add allegations that demonstrate standing); *Morlan v. Universal Guar. Life Ins. Co*., 298 F.3d 609, 617 (7th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003) ("filing of the amended complaint was the equivalent of filing a new suit" for purposes of standing); *United States v. Currency $267,961.07*, 916 F.2d 1104, 1107-9 (6th Cir.

1990) (reversing district court's refusal to consider whether allegations in amended complaint cured standing defect in original complaint).

The district court's reliance on *Perry v. Village of Arlington Heights*, 186 F.3d 826 (7th Cir. 1999), which likewise stands for the proposition that standing should have been evaluated at the filing of the second amended complaint, is puzzling. The district court in *Perry* dismissed the plaintiff's amended complaint because it contained no allegations sufficient to establish standing. *Id*. at 829. Although the plaintiff later presented facts demonstrating his standing, the Seventh Circuit affirmed dismissal of the amended complaint because it did not include plaintiffs' "after-acquired" facts and the plaintiff declined the district court's invitation to amend the complaint a second time to include them. *Id*. Had the plaintiff in *Perry* amended his complaint to include the additional facts demonstrating his standing, the Seventh Circuit and the district court would have considered those facts. Thus, the Seventh Circuit's rationale in *Perry* is in line with the rationale enunciated in *Morlan* and the other cases upon which plaintiffs rely. [8] These three plaintiffs demonstrated their standing by alleging they obtained knowledge of Chubb's discriminatory practices through direct contact and that it would have been futile to apply for insurance.

[8] Indeed, the district court fails to accurately explain how the decision in *Perry* can be distinguished from the decision in *Morlan*.

3. Plaintiffs have alleged all other elements sufficient to establish standing.

Chubb did not challenge and the district court's Order does not address each of the other various elements necessary to establish standing. Plaintiffs' allegations unquestionably satisfy each of these elements, and accordingly, each is addressed only briefly below.

Plaintiffs must satisfy the other prong of the injury-in-fact requirement, that is, that the harm be "concrete and particularized." To satisfy this requirement, "the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The plaintiffs have met that standard by alleging that because of Chubb's discriminatory policies they have had to purchase, and will continue to have to purchase, inferior insurance at higher prices. JA-37:72-73, 75, 77-79. *See Pickern*, 293 F.3d at 1137-38 (concrete and particularized requirement satisfied by allegations that plaintiff has been unable to gain access to store).

Plaintiffs' allegations that Chubb utilized minimum value requirements, other discriminatory objective and subjective criteria and a primarily white sales force and/or underwriting staff to preclude plaintiffs from obtaining insurance satisfies the requirement of a causal relationship between the harm and the alleged violations. Specific provisions of the FHA, §1981 and §1982, which provide for injunctive and monetary relief,

demonstrate that plaintiffs' alleged injuries are likely to be redressed. Thus all of the Article III standing requirements are met.

The "prudential" limitations on standing under §1981 and §1982 claims also could not have been a basis upon which to dismiss plaintiffs' claims. The Supreme Court has set forth two such prudential limitations. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). First, plaintiffs must assert an injury that is peculiar to them or to a distinct group of which they are a part, rather than one "shared in substantially equal measure by all or a large class of citizens." *Id*. at 499. Second, plaintiffs must "assert [their] own legal interest rather than those of third parties." *Id*. These limitations are applied because, in the absence of any special Congressional order to do so, (*i.e*. the FHA), courts seek to "avoid deciding questions of broad social import where no individual rights would be vindicated and to limit the federal courts to those litigants best suited to assert a federal claim." *Gladstone,* 441 U.S. at 99-100. The key to the inquiry is whether the litigants "personally would benefit in a tangible way from the court's intervention." *Warth*, 504 U.S. at 508.

Plaintiffs have alleged that Chubb's practices discriminate against a community of African Americans and that they are members of this community. *See* pp. 8, *supra*. This satisfies the first prudential limitation.

Plaintiffs have also alleged that Chubb discriminatory polices will prevent them from obtaining homeowners insurance for their homes. *See* pp. 8-9, *supra*. This satisfies the second prudential limitation. Because it is evident plaintiffs would benefit from the district court's intervention, their second amended complaint satisfies prudential limitations on standing.

Accordingly, the allegations in plaintiffs' second amended complaint are sufficient to satisfy standing requirements under the FHA, §1981 and §1982. The district court committed reversible error in dismissing plaintiffs second amended complaint for lack of standing. The district court further committed reversible error by dismissing plaintiffs' second amended complaint *with prejudice*. *Ahmed v. United States*, 147 F.3d 791, 797 (8th Cir. 1998) ("dismissal for lack of jurisdiction is not an adjudication on the merits and thus such a dismissal should be without prejudice").

C. The District Court Must Provide Notice and Permit Plaintiffs To Submit Evidence Demonstrating Standing Under 12(b)(1).

To the extent (and if at all) that the district court's ruling on standing is premised on plaintiffs' failure to present declarations or other evidence concerning their knowledge of Chubb's discriminatory practices or concerning their intent to contact Chubb once the discriminatory barriers to insurance are removed, the district court prejudiced plaintiffs and committed

reversible error. The district court was required to provide notice to plaintiffs and the opportunity to submit additional evidence in support of their claims.[9]

When preparing their opposition, plaintiffs reasonably believed that the district court would provide them notice and inform them as to whether it would conduct an evidentiary hearing or require plaintiffs to present additional evidence in some other manner in the event it deigned to consider the additional materials Chubb submitted with its motion to dismiss. Plaintiffs were prejudiced when the district court ruled on Chubb's motion without notice and without providing an opportunity to plaintiffs to present additional evidence. As held by numerous federal appellate courts,

> Before a court can… dismiss an action under Rule 12(b)(1) the party asserting the existence of subject matter jurisdiction must be given notice and an adequate opportunity to ascertain and present relevant facts and arguments supporting his claim of jurisdiction.

McCulloch v. Velez, 364 F.3d 1, 7 (1st Cir. 2004) (citing *Frey v. EPA*, 270 F.3d 1129, 1132 (7th Cir. 2001); *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243-44 (11th Cir. 1991); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Local 336, Am. Fed'n of Musicians v. Bonatz*, 475 F.2d 433, 437-38 (3d Cir. 1973)).

[9] If, however, direct contact to an insurance agent is required, it is pointless to remand for that purpose because only three plaintiffs had such contact.

Dismissal for lack of standing at the pleadings stage is generally inappropriate under the liberal federal pleading standards. *Havens*, 455 U.S. at 377-78; *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). *See also Fair Housing Council of Sub. Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 74 (3d Cir. 1998) (standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation"). At the very least, this Court should reverse the district court's Order and remand with the mandate that plaintiffs be permitted to present additional evidence supporting their allegations for the purposes of standing.

VIII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reverse the district court's Order of March 26, 2004 dismissing plaintiffs' claims for lack of subject matter jurisdiction and remand the case for discovery and further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2004, a true and correct paper and electronic copy of the foregoing was sent via United States Mail, first class, postage pre-paid, to Michael E. Waldeck and Julie J. Gibson of Niewald, Waldeck & Brown, 120 W. 12th Street, Suite 1300, Kansas City, MO 64105.

s/ Eden Brown Gaines
Eden Brown Gaines

No. 04-2353

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CYNTHIA E. CANADY ET AL.,

Plaintiffs-Appellants,

v.

FEDERAL INSURANCE COMPANY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri (Kansas City)
(Civil No. 97-1141-CV-W-2)
The Honorable Fernando J. Gaitan Jr.
United States District Judge

ADDENDUM TO APPELLANTS' BRIEF

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LEXSEE 2003 US DIST LEXIS 5145

DISABLED IN ACTION OF METROPOLITAN NEW YORK, ROBERT LEVINE, and FRIEDA ZAMES, Plaintiffs, -against- TRUMP INTERNATIONAL HOTEL & TOWER, A to K Corporations (fictitiously named corporations) and A to K PARTNERSHIPS/PROPRIETORSHIPS (fictitiously named businesses) jointly and severally, Defendants.

01 Civ. 5518 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 5145

April 1, 2003, Decided
April 2, 2003, Filed

DISPOSITION: [*1] Defendant's motion for summary judgment denied. Defendant's motion to dismiss plaintiffs' information and belief claim granted.

CASE SUMMARY:

PROCEDURAL POSTURE: In an action filed by plaintiffs, a civil rights group and two of its members, under Title III of the Americans with Disabilities Act (ADA), *42 U.S.C.S. § 12181* et seq., defendant building moved for summary judgment pursuant to Fed. R. Civ. P. 56 on plaintiffs' wheelchair lift claim and to dismiss their other claims pursuant to Fed. R. Civ. P. 12.

OVERVIEW: Plaintiffs sued the building, alleging that its two wheelchair lifts, installed to provide access from the street level, were not independently accessible as required by the ADA. The members had visited the buildings and were unable to use the lifts themselves, but had to seek hotel staff to assist them. The court determined that the members had standing to sue, because they lived in the city in which the building was located, had visited the building before, and would like to visit again but for the access difficulties they encountered. However, the court dismissed the civil rights group because it asserted the same claims and sought the same relief as the members, who were necessary to the suit. The members' claim was not moot due to the building's installing fixed keys in the lifts' locks because they were unable to use the lift independently despite the fixed key system. Because neither the members nor an architect could utilize the lifts on their own with the fixed key system, the court could not determine whether the fixed key system actually facilitated unassisted access as required by the ADA. The court dismissed the claim that other violations existed in the building.

OUTCOME: The building's motion for summary judgment plaintiffs' wheelchair lift claim was denied. The building's motion to dismiss the plaintiffs' other ADA claims was granted.

LexisNexis(R) Headnotes

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN1] See *42 U.S.C.S. § 12182*(a).

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN2] Under the Title III of the Americans with Disabilities Act, *42 U.S.C.S. § 12181* et seq., certain private entities are considered public accommodations if the operations of such entities affect commerce. *42 U.S.C.S. § 12181*(7). Included in this list of entities are a restaurant, bar, or other establishment serving food or drink. *42 U.S.C.S. § 12181*(7)(B).

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN3] Title III of the Americans with Disabilities Act, *42 U.S.C.S. § 12181* et seq., applies to existing buildings, newly constructed buildings, and altered buildings. *42 U.S.C.S. § § 12182*(b)(2)(A)(iv), § 12183.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN4] With respect to altered facilities, discrimination constitutes a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. *42 U.S.C.S. § 12183*(a)(2). Title III of the Americans with Disabilities Act (Act), *42 U.S.C.S. § 12181* et seq., provides further: where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General). Congress has delegated to the Department of Justice, through the Attorney General, the responsibility for issuing regulations to enforce the Act. *42 U.S.C.S. § 12186*(b).

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN5] Newly constructed and altered buildings are subject to regulations in 28 C.F.R. pt. 36, subpt. D, and must comply with the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which are published in 28 C.F.R. pt. 36, app. A. See *28 C.F.R. § 36.406*. If alterations involve an area containing a "primary function," then work must be done to create an accessible path of travel from the building exterior to the altered area. *28 C.F.R. § 36.403*; 28 C.F.R. pt. 36, app. A, ADAAG 4.1.6(2). Under the ADAAG standards, in newly constructed buildings, wheelchair lifts may be used to provide access only under certain circumstances. 28 C.F.R. pt. 36, app. A, ADAAG 4.1.3, exception 4. However, the regulations provide that in altered buildings, wheelchair lifts complying with ADAAG 4.11 and applicable state or local codes may be used as part of an accessible route and the "use of lifts is not limited" as it is in newly constructed buildings. ADAAG 4.1.6(3)(g). Wheelchair lifts must comply with ADAAG 4.11, which provides that lifts shall comply with ADAAG 4.2.4, 4.5, 4.27, and ASME A17.1 Safety Code for Elevators and Escalators, Section XX, 1990. ADAAG 4.11.2.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN6] ASME A17.1 provides that with respect to vertical wheelchair lifts, operation of the car from the upper or lower landing and from the car shall be controlled by a key. ASME A17.1 Safety Code for Elevators and Escalators, § XX, Rule 2000.10a (1990). Finally, under the regulations, lifts must facilitate unassisted entry, operation, and exit from the lift. 28 C.F.R. pt. 36, app. A, ADAAG 4.11.3.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN7] Title III of the Americans with Disabilities Act (ADA), *42 U.S.C.S. § 12181* et seq., grants a private right of action to any person who is being subjected to discrimination on the basis of disability in violation of Title III, or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of *42 U.S.C.S. § 12183. 42 U.S.C.S. § 12188*(a)(1). The provision gives individuals the right to seek injunctive relief but not damages.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN8] See *42 U.S.C.S. § 12188*(a)(2).

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN9] Title III of the Americans with Disabilities Act (ADA), *42 U.S.C.S. § 12181* et seq., explicitly does not require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization does not intend to comply with Title III of the ADA. *42 U.S.C.S. § 12188*(a)(1). When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application. Congress has intended that this "futile gesture" doctrine apply to ADA claims.

Constitutional Law > The Judiciary > Case or Controversy > StandingConstitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN10] Even if a plaintiff has suffered an injury within the meaning of Title III of the Americans with Disabilities Act, *42 U.S.C.S. § 12181* et seq., his injury must also satisfy the "case" or "controversy" requirement of U.S. Const. art. III.

Constitutional Law > The Judiciary > Case or Controversy > Standing
[HN11] The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing the elements of standing and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Constitutional Law > The Judiciary > Case or Controversy > Standing
[HN12] A plaintiff must have standing at the time a lawsuit is filed. Events occurring after the lawsuit has been filed may be relevant to whether the claim has become moot but are not relevant to whether a plaintiff has standing in the first instance.

Constitutional Law > The Judiciary > Case or Controversy > Standing
[HN13] To satisfy the injury-in-fact requirement for standing, plaintiffs must show "actual or imminent injury."

Constitutional Law > The Judiciary > Case or Controversy > StandingConstitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN14] Courts considering Title III of the Americans with Disabilities Act, *42 U.S.C.S. § 12181et* seq., claims have found that disabled plaintiffs who had encountered barriers at restaurants, stores, hotels, or stadiums prior to filing their complaints have standing to bring claims for injunctive relief if they show a plausible intention or desire to return to the place but for the barriers to access.

Constitutional Law > The Judiciary > Case or Controversy > StandingConstitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN15] To establish the injury-in-fact requirement for standing, in addition to showing "actual or imminent" injury, plaintiffs must show that their injury is "concrete and particularized." By particularized, it is meant that the injury must affect the plaintiff in a personal and individual way. Courts have held that plaintiffs bringing Title VII of the Americans with Disabilities Act, *42 U.S.C.S. § 12181* et seq., claims to remove barriers to access have standing to challenge only those violations affecting their particular disabilities.

Constitutional Law > The Judiciary > Case or Controversy > Standing
[HN16] Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Constitutional Law > The Judiciary > Case or Controversy > Standing
[HN17] An association has standing to sue on behalf of its members when at least one of its members has standing to sue in his own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The United States Supreme Court has held that the third prong of this test is a prudential, not a constitutional, requirement.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Enforcement
[HN18] The United States District Court for the Southern District of New York has held that a plaintiff is not required to notify state or local authorities before filing his Title III of the Americans with Disabilities Act (Title III), *42 U.S.C.S. § 12181* et seq., claim in federal court. Under *42 U.S.C.S. § 12188*(a)(1), Title III's "remedies and procedures" are the remedies and procedures set forth in *42 U.S.C. § 2000a-3*(a), and although *42 U.S.C.S. § 2000a-3*(c) requires prior notice, *42 U.S.C.S. § 2000a-3*(a) does not.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN19] Under the regulations of Title III of the Americans with Disabilities Act, *42 U.S.C.S. § 12181* et seq., wheelchair lifts must be key operated and that the lifts must facilitate unassisted entry, operation, and exit.

Constitutional Law > The Judiciary > Case or Controversy > Mootness
[HN20] The standard the United States Supreme Court has announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: a case might become moot if subsequent events made it

absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage
[HN21] The regulations provide that wheelchair lifts may be used as part of an accessible route into a building if they comply with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) 4.11. 28 C.F.R. pt. 36, app. A, ADAAG 4.1.6(3)(h). ADAAG 4.11.3 provides that lifts shall facilitate unassisted entry, operation, and exit from the lift. ADAAG 4.11.3. The regulations do not prohibit any assistance in operating lifts, but rather require only that the lifts "facilitate" unassisted access and operation.

Civil Procedure > Pleading & Practice > Pleadings > Amended PleadingsCivil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss
[HN22] A claim for relief may not be amended by the briefs in opposition to a motion to dismiss.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to DismissCivil Procedure > Summary Judgment
[HN23] If the parties have adequate notice, a motion to dismiss may be converted to a motion for summary judgment if the issues to be resolved on summary judgment are "discrete and dispositive."

Civil Procedure > Pleading & Practice > Pleadings > Interpretation
[HN24] A plaintiff's statement under Fed. R. Civ. P. 8(a)(2) must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

COUNSEL: EDWARD KOPELSON, ESQ., Kopelson & Westreich, Morristown, NJ, for Plaintiffs.

GREGORY BEGG, ESQ., Peckar Abramson, Riveredge, NJ, for Defendants.

JUDGES: Michael B. Mukasey, U.S. District Judge.

OPINIONBY: Michael B. Mukasey

OPINION:

OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

Plaintiffs Disabled In Action ("DIA"), Robert Levine, and Frieda Zames sue Trump International Hotel and Tower ("Trump Building," "Building," or "defendant") alleging that various features of the Building are not sufficiently accessible to the disabled, in violation of Title III of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12181 et seq. (2000)*, *New York Executive Law § 296(2)*, and New York City Human Rights Law § 8-107. n1 Plaintiffs seek injunctive relief, damages, attorneys fees and punitive damages. As to plaintiffs' claim that the wheelchair lifts at the Building are not independently operable, defendant moves for summary judgment under *Fed. R. Civ. P. 56*. Defendant moves to dismiss under *Fed. R. Civ.* [*2] *P. 12(b)(6) and/or 12(c)* plaintiffs' claim that on "information and belief" other ADA violations exist.

n1 Plaintiffs sue also A to E Corporations and Partnerships/Proprietorships, which they say "are fictitiously named business entities that own, operate, manage and/or lease Trump International Hotel." (Compl. P 5) Plaintiffs never amended their complaint to supply those parties' real names. "Defendant" in this opinion refers to the Trump International Hotel and Tower.

For the reasons stated below, defendant's motion for summary judgment is denied. Plaintiffs' claim that other violations at the Trump Building exist is dismissed.

I.

The following facts are undisputed unless described otherwise. From 1995 to 1997, the partnership One Central Park West Associates, P.T., L.P., ("Partnership") turned the Gulf & Western Building into the Trump International Hotel and Tower. The Building, built in 1969 as an office tower, is located at One Central Park West in Manhattan. (*Def.'s 56.5, 1 P 1;* Weiss Aff. [*3] P 1) The building rests on a pedestal (or "plaza"), approximately four feet above the sidewalk on all four sides of the Building: the 61st Street, 60th Street, Central Park West, and Broadway sidewalks, respectively. (Def.'s 56.*1 P 2;* Weiss Aff. P 2) According to Andrew Weiss, the principal of the Partnership who was responsible for overseeing the redevelopment design and construction, the main lobby entrances of the building have been located on the elevated plaza level since 1969. (Weiss Aff. P 2) n2

n2 Plaintiffs assert that whether the main lobby entrances have been located on the elevated

plaza since 1969 is unknown to them because they have not had a chance to conduct discovery. (Pls.' 56.*1 P 2)*

The alterations created three lobbies at the plaza level to provide access to the residential, hotel, and restaurant areas of the Building. (Def.'s 56.*1 P 3;* Weiss Aff. P 3) According to Weiss, before the alteration, only stairs provided "immediate vertical access" from the [*4] sidewalks to the elevated lobby entrances. (Weiss Aff. P 4; Def.'s 56.*1 P 4) n3* Weiss says that as part of the alteration two wheelchair lifts were installed to provide an "accessible path of travel" from the street level to the lobbies at the plaza level. One lift is located at the South-West corner of Central Park West and 61st Street; the other is further West on 61st Street. (Weiss Aff. P 4; Def.'s 56.*1 P 4)*

n3 Plaintiffs assert that without the ability to conduct discovery, they do not know whether it is true that only stairs provided access to the lobby prior to the alterations. (Pls.' 56.*1 P 4)*

According to Thomas P. Downing, the assistant general manager of the Trump Building, each lift travels between the sidewalk level and the plaza level. At each level there is a call button next to a key switch adjacent to the lift door. To call the lift to a level if it is at another level, the call button must be unlocked before it is pressed. To operate the lift, the operator [*5] must also turn a key switch that locks the "up" and "down" buttons on a control panel inside the lift. (Downing Aff. P 3; Def.'s 56.*1 P 6)* According to Downing, prior to October 12, 2001, all doormen at the building wore lift keys around their necks to unlock the lift switches. The doormen assisted all lift users in operating the lifts. (Downing Aff. P 4; Def.'s 56.*1 P 7)* As of October 12, 2001, "fixed keys" are hung at each lock on a chain affixed near the lock. (Downing Aff. P 5; Def.'s 56.*1 P 8)* Downing says that doormen and security personnel periodically inspect the lifts, ensure that keys are kept in the locks, and immediately replace any missing keys. In addition, doormen continue to wear keys around their necks. (Downing Aff. P 6; Def.'s 56.*1 P 9)* Downing asserts that Trump Building intends to retain the current key procedure "for the foreseeable future." (Downing Aff. P 7)

Plaintiffs' complaint, filed on June 18, 2001, states that Disabled in Action ("DIA") is a "civil rights group organized by individuals with disabilities to advocate for disabled persons' integration into society and equal access to all services, activities, [*6] programs, resources and facilities available to non-disabled persons." (Compl. P 2) "Its members are predominately individuals with various physical disabilities impairing mobility, vision and hearing." (Id.) Plaintiff Robert Levine, a resident of New York, is a DIA member who uses a wheelchair "as a result of a mobility impairment." (*Id. P 3)* "He enjoys dining out; patronizes restaurants in the neighborhood of the Defendants' properties; has attempted to dine at the Defendants' restaurants; and desires to dine at Defendants' restaurants in the future." (Id.) Plaintiff Freida Zames, also a DIA member, is a resident of New York City who uses a motorized scooter as a result of a mobility impairment. (*Id. P 4)* The complaint alleges that she "enjoys dining out, patronizes restaurants in the neighborhood of the Defendants' properties; and desires to dine at Defendants' restaurants in the future." (Id.) The complaint alleges that "members of Plaintiff organization, and the individual Plaintiffs, are restaurant patrons who have or have attempted to dine at Defendants' premises in the past and desire and intend to do so in the future." (*Id. P 7)* [*7]

The complaint alleges that the Trump Building is not accessible to the disabled. "Among the barriers to accessibility is a locked lift that bars all independent access to Defendants' property by wheelchair and scooter users." (*Id. P 8)* In addition, the complaint states that "on information and belief, Defendants maintain other policies, practices, and structural impediments to accessibility which discriminate against the disabled, and Defendants have made alterations to their facilities in a manner that does not comply with the accessibility requirements of the ADA." (*Id. P 9)* The complaint states: "On December 18, 2000, and again on February 8, February 27, and June 5, 2001, Plaintiffs asked Defendants to voluntarily eliminate the locked lift and make their property independently accessible. Defendants refused." (*Id. P 12)*

Plaintiffs assert that the Trump Building is a place of public accommodation within the scope of Title III of the ADA, *42 U.S.C. § 12181*, *New York Executive Law § 296(2)*, and New York City Human Rights Law § 8-107 (Compl. P 6) and they assert that defendants' premises, practices, and [*8] policies discriminate against the disabled in violation of these laws (*Id. PP 14-16).*

Defendant moves for summary judgment as to plaintiffs' claim that there is no independent access to the wheelchair lifts. Defendant argues that plaintiffs lack standing to seek injunctive relief as to this claim, have failed to exhaust their administrative remedies, and have no claim as a matter of law, and that any claim they may have had is now moot. (Trump's Mem. at 1)

Plaintiffs have submitted affidavits in opposition to defendant's motion for summary judgment. Plaintiff Levine asserts that he has had polio since childhood and

began using a wheelchair after he had a stroke in 1989. (Levine Aff. P 1) Levine, who has lived in Manhattan for 13 years, states that he noticed the Trump Building in the Summer of 2000 while on a bus, and, as a city planner, was interested in the building. (*Id. PP 2-3)* He made plans to have lunch at the restaurant on the plaza (Jean Georges) with his friend Frieda Zames. (*Id. P 3).* When he went to the Building for lunch, Levine noticed "there was no signage anywhere around the site" and he claims he "was surprised to [*9] have such difficulty finding any access point." (*Id. P 4)* He states that he and Zames found two wheelchair lifts but "neither of them worked." According to Levine, eventually they used the lift with the assistance of a doorman or employee of the building. (*Id. P 5)* He says he was "made to feel like a second class citizen." (Id.) Plaintiff Frieda Zames, who has lived in Manhattan for 40 years, asserts in her affidavit that she has been disabled since childhood as a result of polio and uses a motorized scooter for mobility. (Zames Aff. P 1) Zames says that she and Levine had to ask an employee to help them to operate the lifts when they went to the Trump Building in the Summer of 2000. (*Id. P 3-5)* She claims she was "made to feel like a grade school child asking permission to go to the bathroom." (*Id. P 6)*

Plaintiffs filed their complaint on June 18, 2001. (Compl.) Levine and Zames state that on December 21, 2001, they returned to Trump Building to dine at Jean Georges after they heard that the lifts had been made independently operable. (Levine Aff. P 6; Zames Aff. P 7) Levine asserts that he tried to use both [*10] lifts when he arrived at the Building but was not able to operate them. A doorman helped him up to the plaza level in the lift and back down to the sidewalk when he left the restaurant. (Levine Aff. P 9-12) Zames asserts that there were keys in the locks at the lifts but she was unable to operate the lifts. She claims that she turned the keys and pushed the buttons in all possible combinations but the lifts did not work. There were no instructions about how to operate the lifts.(Zames Aff. PP 8-10) Zames said she asked one employee for help but he was unable to operate the lift. A second employee "climbed over the door into the lift at the plaza level and brought it down to the sidewalk." (*Id. P 10)*

Levine states that he and his wife "would like to have dinner at Jean George restaurant." "We enjoy eating out frequently and will return to this restaurant when I am independently able [to] get into the restaurant. Until then, despite our desire to dine there, I cannot again subject myself to the humiliation of trying to enter [the Trump Building] through its second class route of access." (Levine Aff. P 13)

Zames says that "if the lifts were independently operable, [*11] I would return to the restaurant and sit on the plaza." (Zames Aff. P 13) Zames asserts: "I often go with a friend to the area and enjoy eating outdoors in warm weather. As soon as I am able to independently get to the restaurant and plaza at [Trump Building] I will dine there and sit in the sun on the plaza." (*Id. P 14)*

Peter Hanrahan, an architect retained by the plaintiffs, visited the Trump Building on January 9, 2002. He went first to the lift further to the west on West 61st Street. According to Hanrahan, the lift was positioned between the sidewalk and plaza levels. He says: "Neither the lift door at the sidewalk or the plaza level would open. However, while the keys next to the lift door handles turned, none of the buttons on either door would cause the platform to move. I tried every combination of key turns and button pushes at each door but was unable to move the lift platform or open a door to it." (Hanrahan Aff. P 9) Hanrahan says he approached the other lift from the sidewalk. The platform was at the plaza level and from the sidewalk he was unable to move the platform down. He asked for assistance from a doorman who "approached the lift on the plaza [*12] level and brought it down to the sidewalk." (*Id. P 10)* Hanrahan says he was with Edward Kopelson, who was in a wheelchair. Mr. Kopelson entered the lift with the doorman. Hanrahan asserts that after lunch he and Kopelson opened the door to the lift at the plaza level without turning a key or pushing a button, and they used the lift to exit the property. (*Id. P 12)* Hanrahan concludes that neither lift was independently operable from the sidewalk level. (*Id. P 16)*

In addition to its motion for summary judgment on the wheelchair lift claim, defendant moves to dismiss plaintiffs' claim that "on information and belief" there are other barriers to access for the disabled at the Trump Building and that the alterations made to the Building do not comply with the ADA's accessibility requirements. In response to defendant's motion to dismiss, plaintiffs describe several specific features of the Building, other than the lifts, that they claim violate the ADA. The affidavit of Hanrahan describes these alleged violations. (Hanrahan Aff.)

For the reasons stated below, defendant's motion for summary judgment is denied. Plaintiffs' claim that other [*13] violations at the Trump Building exist is dismissed.

II.

I first consider defendant's motion for summary judgment on plaintiffs' claim that the wheelchair lifts violate the ADA because they are not independently operable.

A. The ADA

[HN1] Title III of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *42 U.S.C. § 12182(a) (2000)*. [HN2] Under the Act, certain "private entities are considered public accommodations ... if the operations of such entities affect commerce." *42 U.S.C. § 12181(7)*. Included in this list of entities are "a restaurant, bar, or other establishment serving food or drink." Id. *§ 12181(7)(B)*. The Trump Building, and Jean Georges, are public accommodations. See *28 C.F.R. § 36.201(b) (2000)* ("Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates [*14] the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or contract.").

[HN3] The ADA applies to existing buildings, newly constructed buildings, and altered buildings, see *42 U.S.C. § § 12182(b)(2)(A)(iv) & 12183 (2000)*. The Trump Building, renovated between 1995 and 1997, is subject to the regulations for altered buildings. See *42 U.S.C. § 12181* (note) (section covering altered buildings effective 18 months after date of enactment, July 26, 1990).

[HN4] With respect to altered facilities, discrimination constitutes "a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." Id. *§ 12183(a)(2)*. *The Act* provides further:

> Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity [*15] shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

Id. Congress delegated to the Department of Justice, through the Attorney General, the responsibility for issuing regulations to enforce the Act. See *42 U.S.C. § 12186(b)*.

[HN5] Newly constructed and altered buildings are subject to regulations in *28 C.F.R. Part 36, Subpart D*, and must comply with the "ADA Accessibility Guidelines" ("ADAAG"), which are published in *Appendix A of Part 36*. See *28 C.F.R. § 36.406*. If alterations involve an area containing a "primary function," then work must be done to create an accessible path of travel from the building exterior to the altered area. [*16] See id. *§ 36.403*; *28 C.F.R. Pt. 36, app. A, ADAAG 4.1.6(2)*. Under the ADAAG standards, in newly constructed buildings, wheelchair lifts may be used to provide access only under certain circumstances. See *28 C.F.R. Pt. 36, app. A, ADAAG 4.1.3*, Exception 4. However, the regulations provide that in altered buildings, wheelchair lifts "complying with [ADAAG] *4.11* and applicable state or local codes may be used as part of an accessible route" and the "use of lifts is not limited" as it is in newly constructed buildings. Id. *4.1.6(3)(g)*. Wheelchair lifts must comply with ADAAG *4.11*, which provides that lifts "shall comply with [ADAAG] *4.2.4*, *4.5*, *4.27*, and ASME A17.1 Safety Code for Elevators and Escalators, Section XX, 1990." Id. *4.11.2*. [HN6] ASME A17.1 provides that with respect to vertical wheelchair lifts, "operation of the car from the upper or lower landing and from the car shall be controlled by a key." ASME A17.1 Safety Code for Elevators and Escalators, Section XX, Rule 2000.10a (1990). Finally, under the regulations, lifts must "facilitate unassisted entry, operation, and exit from the lift." *28 C.F.R. Pt. 36, app. A, ADAAG 4.11.3*.

[HN7] Title [*17] III of the ADA grants a private right of action "to any person who is being subjected to discrimination on the basis of disability" in violation of Title III, or "who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of *section 12183* of this title." *42 U.S.C. § 12188(a)(1) (2000)*. The provision gives individuals the right to seek injunctive relief but not damages. See id. (providing that the remedies available to individuals shall be those set forth in *42 U.S.C. § 2000a-3(a)*, which allows only injunctive relief for violations of Title II of the Civil Rights Act of 1964, Pub. L. 88-352, codified as amended at *42 U.S.C. § 2000a et seq.*). Title III provides further:

> [HN8] In the case of violations of *sections 12182(b)(2)(A)(iv)* and *section 12183(a)* of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an [*18] auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

Id. *§ 12188(a)(2)*.

[HN9] Title III explicitly does not require "a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization ... does not intend to comply" with Title III of the ADA. Id. *§ 12188(a)(1)*. The "futile gesture" language of Title III is taken from *Teamsters v. United States, 431 U.S. 324, 366, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977)*. In Teamsters, the Supreme Court held that plaintiffs who did not actually apply for promotions could challenge the employer's racially discriminatory seniority system under Title VII of the Civil Rights Act of 1964 if they could show that they would have applied for the job but for the employer's discriminatory practices. *Teamsters, 431 U.S. at 367-68*. The Court in Teamsters reasoned that "when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the [*19] motions of submitting an application." *Id. 431 U.S. 324 at 365-66*. Congress intended that this "futile gesture" doctrine apply to ADA claims. See H. Rep. No. 101-485(II), at 82-83 (1990) reprinted in 1990 U.S.C.C.A.N. 303, 365; see also *Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1136 (9th Cir. 2002)*.

B. Standing

Defendant argues that plaintiffs lack standing to obtain injunctive relief regarding the lifts. [HN10] Even if a plaintiff has suffered an injury within the meaning of Title III of the ADA, his injury must also satisfy the "case" or "controversy" requirement of *Article III of the Constitution*.

1. Standing of Levine and Zames

It is well established that [HN11] the "irreducible constitutional minimum of standing contains three elements," *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*.

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained [*20] of ... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. 504 U.S. 555 at 560-561 (citations and internal quotation marks omitted). The party invoking federal jurisdiction bears the burden of establishing the elements of standing and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id. 504 U.S. 555 at 561*.

[HN12] A plaintiff must have standing at the time a lawsuit is filed. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190-91, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)*; *Defenders of Wildlife, 504 U.S. at 569 n.4*; see also *Steger v. Franco, 228 F.3d 889, 892 (8th Cir. 2000)*; *Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993)*. Events occurring after the lawsuit has been filed may be relevant to whether the claim has become moot but are not relevant to whether a plaintiff has standing in the first instance. See *Laidlaw, 528 U.S. at 189*. [*21] Levine and Zames' visit to the Trump Building in the Summer of 2000, before their complaint was filed, is relevant to whether they had standing when they filed this lawsuit. Their experiences during their December 2001 visit, and the report of Peter Hanrahan, are relevant only to whether plaintiffs' claims have become moot.

At issue is whether plaintiffs have satisfied the first requirement for standing, an "injury in fact." [HN13] To satisfy the injury-in-fact requirement, plaintiffs must show "actual or imminent injury." *Defenders of Wildlife, 504 U.S. at 560*.

[HN14] Courts considering ADA claims have found that disabled plaintiffs who had encountered barriers at restaurants, stores, hotels, or stadiums prior to filing their complaints have standing to bring claims for injunctive relief if they show a plausible intention or desire to return to the place but for the barriers to access. See *Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1138 (9th Cir. 2002)* (plaintiff had standing who had encountered barriers at a grocery store and who stated that he would shop there again if it were accessible); *Steger v. Franco, 228 F.3d 889 (8th Cir. 2000)* [*22] (to demonstrate standing plaintiffs must "at least prove

knowledge of the barriers and that they would visit the building in the imminent future but for those barriers"); see also *D'Lil v. Stardust Vacation Club, 2001 U.S. Dist. LEXIS 23309, No. CIV-S-00-1496, 2001 WL 1825832*, at *4 (E.D. Cal. Dec 21, 2001) (plaintiff had standing who alleged that she "would, could and will return to the [hotel] ... when it is made accessible to persons with disabilities," she had a history of travel to the area, and she had particular reasons for seeking accommodation at the hotel); *Access Now, Inc. v. South Florida Stadium Corp., 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001)* (plaintiff who testified that he would return to stadium, particularly if the alleged barriers were removed, had standing); *Access 123 v. Markey's Lobster Pool, Inc., 2001 U.S. Dist. LEXIS 12036*, No. CIV. 00-382-*JD, 2001 WL 920051*, at *3 (D.N.H. Aug. 8, 2001) (plaintiff had standing when he was aware of barriers in accessing restaurant from parking lot, barriers had not been removed when complaint was filed, and he stated "he would return to [the restaurant] if the barriers were removed"); *Ass'n. for Disabled Americans v. Claypool Holdings, 2001 U.S. Dist. LEXIS 23729, No. IP00-0344-C-T/G, 2001 WL 1112109*, [*23] at *20 (S.D. Ind. Aug. 6, 2001) (plaintiff had standing who "expressed a desire to stay overnight at the Embassy Suites on future visits to Indianapolis if the hotel were ADA compliant" and who presented evidence that he traveled to Indianapolis at least once a year); *Dudley v. Hannaford Bros. Co., 146 F. Supp. 2d 82, 86 (D. Me. 2001)* (plaintiff had standing who alleged that Shop 'n Save refused to sell him alcohol based on his disability and had not altered its policies, and who alleged that he often visited Shop 'n Save stores and would like to purchase alcohol but had not attempted to do so based on his past experience); *Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1080 (D. Haw. 2000)* (holding after bench trial that plaintiff had standing to bring claim against fast-food restaurant in part because the court was "satisfied that Plaintiff's intent to return [was] sincere"); Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, No. Civ.A. 96-*WY-2490-AJ, et al., 1997 WL 33471623*, at *6 (D. Colo. Aug. 5, 1997) (plaintiff has standing if he shows that "discrimination on the basis of disability has deprived [*24] him of the ability to gain access to the public accommodations and that a failure to redress the injury will continue to deprive him of access to those facilities in the future"). n4

n4 Courts have held that plaintiffs lack standing to seek injunctive relief under the ADA when they have not stated an intention or desire to return to the place where they had previously encountered an ADA violation, or have failed to show a likelihood of discrimination should they return to that place. See *Shotz v. Cates, 256 F.3d 1077, 1082 (11th Cir. 2001)*; *Stan v. Wal-Mart Stores, Inc., 111 F. Supp. 2d 119, 126 (N.D.N.Y. 2000)*; *Moreno v. G & M Oil Co., 88 F. Supp. 2d 1116, 1116-17 (C.D. Cal. 2000)*; *Deck v. Am. Haw. Cruises, Inc., 121 F. Supp. 2d 1292, 1299 (D. Haw. 2000)*; *DeLil v. El Torito Restaurants, Inc., 1997 U.S. Dist. LEXIS 22788*, No. C 94-3900-*CAL, 1997 WL 714866*, at *4 (N.D. Cal. June 24, 1997); *Cortez v. National Basketball Ass'n, 960 F. Supp. 113, 118 (W.D. Tx. 1997)*; *Wood v. Sink, 1996 U.S. Dist. LEXIS 21928*, No. 6:95*CV00362, 1996 WL 544376*, at *3 (M.D.N.C. July 30, 1996); *Adelman v. Acme Markets Corp., 1996 U.S. Dist. LEXIS 4152, Civ. No. 95-4037, 1996 WL 156412*, at *2 (E.D. Pa. Apr. 3, 1996); *O'Brien v. Werner Bus Lines, 1996 U.S. Dist. LEXIS 2119, Civ. A. No. 94-6862, 1996 WL 82484*, *4 (E.D. Pa. Feb. 27, 1996).

[*25]

Defendant argues that Levine and Zames' statements that they intend to return to the Trump Building are the type of "some day intentions" that the Court held were insufficient to confer standing in *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*. In Defenders of Wildlife, a plaintiff environmental group challenged a rule that limited *§ 7 of the Endangered Species Act of 1973 to* actions within the United States or on the high seas, and sought an injunction requiring the Secretary of the Interior to promulgate a new regulation. *Id. 504 U.S. 555 at 557-59*. To establish an injury in fact, the environmental group submitted affidavits of two of its members who both described past experiences of observing endangered species in Egypt and Sri Lanka, and stated their intent to return. *Id. 504 U.S. 555 at 563-64*. The Court held that "such 'some day' intentions -- without any description of concrete plans, or indeed even any specification of when the someday will be -- do not support a finding of the 'actual or imminent' injury that our cases require." *Id. 504 U.S. 555 at 564*.

Levine and Zames' statements that they would return to Jean Georges but for the barriers to access are not the type [*26] of "some day" intentions rejected in *Defenders of Wildlife*. See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 184, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)* ("Nor can the affiants' conditional statements -- that they would use the nearby North Tyger River for recreation if [the plant] were not discharging pollutants into it -- be equated with the speculative "'some day" intentions' to visit endangered species halfway around the world that we held insufficient to show injury in fact in [Defenders of Wildlife]."). Levine and Zames' desire to return to

Jean Georges is plausible given the fact that they live in New York and have been to the restaurant in the past.

The present case differs also from *City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)*, where the Court held that a plaintiff who had been subjected to a choke hold by the Los Angeles police lacked standing to seek an injunction against the enforcement of a police choke hold policy. The Court said that "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury [*27] from the use of the chokeholds by police officers," *id. 461 U.S. 95 at 105*, and the Court found that there was not a sufficient likelihood of future injury to support standing, *id*. The Court stated that "'past exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.'" *Id. 461 U.S. 95 at 102* (quoting *O'Shea v. Littleton, 414 U.S. 488, 495-96, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974))*. However, in the present case, as in *Laidlaw*, the alleged violation had the ongoing adverse effect of deterring the plaintiffs from visiting a place they would otherwise like to go.

Defendant relies on several cases where courts have considered suits by deaf plaintiffs against hospitals for failure to provide sign language interpreters in emergency rooms and found that the plaintiffs lacked standing to bring claims under Title III of the ADA because there was not a sufficient likelihood that they would return to the hospital for emergency care and face the same problem again. See *Constance v. State Univ. of N.Y. Health Sci. Ctr., 166 F. Supp. 2d 663, 667 (N.D.N.Y. 2001)*; [*28] *Freydel v. N.Y. Hosp., 2000 U.S. Dist. LEXIS 9, No. 97 Civ. 7926, 2000 WL 10264*, at *3 (S.D.N.Y. Jan. 4, 2000); *Naiman v. N.Y. Univ., 1997 U.S. Dist. LEXIS 6616, No. 97 Civ. 6469, 1997 WL 249970*, at *5 (S.D.N.Y. May 13, 1997); *Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 830, 833 (D. Md. 1998)*; *Schroedel v. N.Y. Univ. Med., 885 F. Supp. 594, 599 (S.D.N.Y. 1995)*. Those cases are more closely analogous to Lyons than the present case. A person generally does not desire or intend to receive emergency room treatment, just as Lyons did not desire or intend to be arrested. In the present case, if Levine's and Zames' statements are credited, the alleged ADA violation injures them by deterring them from going to a place they would like to visit. Deaf persons could be injured again by emergency room personnel only if they had to return to the hospital for emergency treatment -- an uncertain event. Likewise, Lyons could be injured again by the police only if he was arrested again -- also an uncertain event. In those cases, unlike in the present case, there is no plausible ongoing injury.

Levine and Zames encountered the alleged wheelchair lift violation before they [*29] filed their complaint, and they have said that they would return to the Trump Building but for the fact that the lifts do not provide unassisted access. They have stated sufficient facts supporting an "actual injury" to survive summary judgment on this issue. Whether Levine and Zames actually do wish to eat at Jean Georges and actually are deterred from going there because they have to ask for help with the lifts cannot be decided on a motion for summary judgment. See *Access Now, Inc. v. South Florida Stadium Corp., 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001)* (court would not make a credibility determination on a motion for summary judgment as to the sincerity of the plaintiff's statement that he wanted to return to stadium).

[HN15] To establish the injury-in-fact requirement for standing, in addition to showing "actual or imminent" injury, plaintiffs must show that their injury is "concrete and particularized." "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Defenders of Wildlife, 504 U.S. at 560 n.1*; see also *Pickern, 293 F.3d at 1137-38*. Courts have held that plaintiffs bringing [*30] ADA claims to remove barriers to access have standing to challenge only those violations affecting their particular disabilities. See, e.g., *Steger, 228 F.3d at 893*; *Ass'n for Disabled Americans, 2001 U.S. Dist. LEXIS 23729, 2001 WL 1112109*, [WL] at *21; *Access 123, 2001 U.S. Dist. LEXIS 12036, 2000 WL 920051*, [WL] at *3. Levine's disability requires him to use a wheelchair; Zames' requires her to use a motorized scooter. Inability to use the lifts independently affects their particular disabilities. Thus, they have met the "concrete and particularized" requirement for standing. Because Levine and Zames also have showed that their injury is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," *Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)*, they have met, at least at this stage of the litigation, the Constitution's requirements for standing.

However, defendant argues that even if plaintiffs have met the Constitution's standing requirements, this court should find standing lacking as a prudential matter. Defendant argues that finding plaintiffs have standing would mean that "any disabled individual [*31] or organization, on a mere wish, would be authorized to sue any public accommodation for barrier removal resulting in a deluge of piecemeal federal ADA litigation." (Def.'s Reply Mem. at 2-3) According to defendant, "this court need not create a private attorney general for ADA enforcement since the ADA already empowers the Attorney General to sue for broad relief." (Id. at 3)

[HN16] "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)*; see also *Bennett v. Spear, 520 U.S. 154, 162, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997)*; *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996)*. None of these prudential principles [*32] apply to bar the claims of Levine and Zames. As disabled persons, Levine and Zames are asserting their own rights. Their complaints are particular to them and not "generalized grievances." Finally, they are plainly within the "zone of interests" protected by the ADA: Congress, by creating a private right of action for disabled people subject to barriers to access intended these people to be able to sue.

2. Standing of DIA

Defendant argues that DIA lacks standing to sue on behalf of its members. [HN17] An association has standing to sue on behalf of its members when at least one of its members has standing to sue in his own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552-53, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996)*; *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)*. The Supreme Court has held that the third prong of this test is a prudential, not a constitutional, [*33] requirement. *United Food, 517 U.S. at 557*.

In this case, DIA's claim merely repeats the claims of Levine and Zames, who are already plaintiffs in this case, and who seek the same injunctive relief as DIA. The participation of Levine and Zames will be necessary at trial to determine whether they have standing under the higher burden of proof. Levine and Zames are the better plaintiffs here, and there is no reason for an organization to assert their rights for them. See Access 123, *Inc. v. Markey's Lobster Pool, Inc., 2001 U.S. Dist. LEXIS 12036, 2001 WL 920051*, [WL] at *4 (D.N.H. Aug. 14, 2001) ("In this case, Access 123 is merely repeating the claims brought by Muehe, himself. Muehe appears to be the better party to assert his own claims. Therefore, Access 123 lacks standing to assert claims on Muehe's behalf, and lacks standing to assert claims on behalf of its other members."); see also *Ass'n for Disabled Americans v. Claypool Holdings, 2001 U.S. Dist. LEXIS 23729, No. IP00-0344-C-T/G, 2001 WL 1112109*, [WL] at *20 (S.D. Ind. Aug. 6, 2001). DIA is dismissed as a plaintiff as to this claim.

C. Notice Requirement

Defendant argues that under Title III, plaintiffs must notify the appropriate state [*34] or local agency 30 days before filing suit and exhaust their administrative remedies prior to filing suit in federal court. Defendants assert that plaintiffs have not given the appropriate notice and have not pursued or exhausted their administrative remedies. (Def.'s Mem. at 22) Plaintiffs deny that Title III requires notice to state or local agencies or exhaustion of administrative remedies.

In *Hunt v. Meharry Medical College, 2000 U.S. Dist. LEXIS 7804, No. 98 Civ. 7193, 2000 WL 739551*, at *5 (S.D.N.Y. June 8, 2000), [HN18] this court held that a plaintiff was not required to notify state or local authorities before filing his Title III claim in federal court. Under *42 U.S.C. § 12188(a)(1)*, Title III's "remedies and procedures" are "the remedies and procedures set forth in [*42 U.S.C.] section 2000a-3(a)*," and although *§ 2000a-3(c)* requires prior notice, *§ 2000a-3(a)* does not. Compare *42 U.S.C. § 2000a-3(c)* (describing notice requirement) with *42 U.S.C. § 2000a-3(a)* (not mentioning a notice requirement). Although several district courts have stated that notice is required, see *Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8, 9 (D.N.H. 1997)*; [*35] *Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1150 (D. Colo. 1996)*, the only Circuit that has considered the issue reached the opposite conclusion, see *Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9th Cir. 2000)* ("The plain language of *§ 12188(a)(1)* is clear and unambiguous, and it can be understood without reference to any other statutory provision. *Section 12188(a)(1)* is devoid of any reference to *§ 2000a-3(c)*. Yet, Congress explicitly incorporated *subsection (a) of § 2000a-3* into *§ 12188(a)(1)*. The incorporation of one statutory provision to the exclusion of another must be presumed intentional under the statutory canon of expressio unius."). Other district courts in this Circuit have concluded that no notice is required before bringing a Title III ADA claim. See *Stan v. Wal-Mart Stores, Inc., 111 F. Supp. 2d 119, 123 (N.D.N.Y. 2000)*; *Mirando v. Villa Roma Resorts, Inc., 1999 U.S. Dist. LEXIS 17887, No. 99 Civ. 0162, 1999 WL 1051118*, at *1 (S.D.N.Y. Nov. 19, 1999). Plaintiffs were not required to notify state or local authorities prior to filing this suit.

Defendant appears to argue that in addition to giving notice [*36] to state or local authorities, plaintiffs must

"exhaust their administrative remedy prior to filing suit." (Def.'s Mem. at 22) Some courts have used the term "exhaustion" to refer to giving notice to state and local authorities. See, e.g., *Stan, 111 F. Supp. 2d at 123*; *Howard, 935 F. Supp. at 1150*. To the extent that defendant is arguing that there is some additional exhaustion requirement, defendant cites no authority supporting such a requirement.

D. Mootness and Merits of Claim

Defendant recognizes that [HN19] under the ADA regulations, wheelchair lifts must be key operated and that the lifts must facilitate unassisted entry, operation, and exit. (Def.'s Mem. at 18) n5 According to defendant, before October 12, 2001, it satisfied its obligations by "stationing lift-key bearing doormen at or near each lift to unlock lifts for utilization by wheelchair users." (Id.) Defendant argues that as of October 12, 2001, it has further facilitated unassisted access by installing permanently fixed keys at each lift lock. (Id. at 19) Defendant says that any claim that plaintiffs had that the previous key system violated the ADA is moot because now "permanently [*37] fixed keys exist at each lock to allow self-operation by users." (Id. at 21)

n5 Defendant states in a letter dated March 25, 2003 that the ADAAG is in the process of being modified and that it is likely that the new ADAAG will not require key operation for platform lifts. (Def.'s Letter 2/25/03) However, the current ADAAG references the 1990 version of the ASME Safety Code, which requires key-operated lifts. See *28 C.F.R. Pt. 36, app. A, ADAAG 4.11.2*; ASME A17.1 Safety Code for Elevators and Escalators, Section XX, Rule 2000.10a (1990).

The Supreme Court in Laidlaw stated: [HN20] "The standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Laidlaw, 528 U.S. at 189* (quoting *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968))*. [*38] "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw, 528 U.S. at 190*.

Even assuming that it is absolutely clear that the fixed key system will remain and defendant will not return to relying solely on the doormen to provide keys, plaintiffs' claim regarding the lifts still has not become moot.

Levine and Zames allege that when they went to the Trump Building on December 21, 2001, they were unable to independently operate either lift. They claim that they tried all combinations of buttons and key-turns but were unable to move the lifts without asking for assistance. (Levine Aff. PP 10-12; Zames Aff. PP 8-10) Hanrahan, the architect retained by the plaintiffs, visited the Trump Building on January 9, 2002, and also was unable to access the lift from the sidewalk level. (Hanrahan Aff. PP 9-12) The statements of Levine, Zames, and Hanrahan, if credited, show that people in wheelchairs have not been able to use the lifts unassisted, despite the fixed key system. Taking these statements as true, defendant [*39] has failed to show that the fixed key system has mooted plaintiffs' claim regarding the lifts.

Defendant is not entitled to summary judgment on the merits of this claim. [HN21] The regulations provide that wheelchair lifts may be used as part of an accessible route into a building if they comply with ADAAG *4.11*. See *28 C.F.R. Pt. 36, app. A, ADAAG 4.1.6(3)(h)*. ADAAG *4.11.3* provides that lifts "shall facilitate unassisted entry, operation, and exit from the lift." Id. *4.11.3*. Defendant correctly points out that the regulations do not prohibit any assistance in operating lifts, but rather require only that the lifts "facilitate" unassisted access and operation. (Def.'s Mem. at 19) However, plaintiffs have stated sufficient facts to preclude summary judgment on the issue of whether the lifts are facilitating such independent access.

Only one other district court has addressed the requirement under the ADA regulations that wheelchair lifts facilitate unassisted access. See *Delil v. El Torito Restaurants, Inc., 1996 U.S. Dist. LEXIS 22029*, No. C 94-3900-*CAL, 1996 WL 807395* (N.D. Cal. Dec. 2, 1996). In that case, the plaintiff brought a claim against the El Torito restaurant arguing that El Torito's [*40] policy regarding access to its wheelchair lift violated the ADA. The lift provided access from the entrance level of the restaurant to the lower level dining area. El Torito claimed that it kept the lift's operating controls locked to prevent children from tampering with the lift and to avoid children being caught under the lift. *Id. 1996 U.S. Dist. LEXIS 22029* [WL] at *1. The plaintiff said that after she was unable to operate the lift herself she asked a hostess for assistance. The hostess found the manager who had a key to the lift. The plaintiff claimed that the manager refused to give her the key and told her that he was the only one allowed to operate the lift. El Torito disputed the plaintiff's claim that she was not allowed to take the key and operate the lift by herself. Id.

The Court denied summary judgment to El Torito, finding that there was a disputed issue of material fact as to whether El Torito prohibited the plaintiff from using the lift without assistance. *Id. 1996 U.S. Dist. LEXIS 22029* [WL] at *6. The Court noted that under ADAAG *4.11* the lift had to comply with the ASME Safety Code. Under this code all lifts must be key-operated, and the Court concluded that the purpose of this requirement was to prevent injury from [*41] unauthorized use of the lifts. The Court said that the ADA did not require the restaurant to leave a key in the lock of the lift. However, the Court said that the regulations did require El Torito to facilitate unassisted entry, operation, and exist from the lift, and "El Torito could make it easy for disabled patrons to operate the lift by themselves without noticeably increasing the risk of injury from unauthorized use, for example by using child-proof locks or by giving all wheelchair-bound patrons a key to the lift when they first enter the restaurant." Id. The Court said that it expressed "no opinion whether requiring a disabled patron to ask for a key in order to operate the lift violates the ADA." *Id. 1996 U.S. Dist. LEXIS 22029* [WL] at *6 n.4.

The circumstances in this case differ somewhat from the Delil case. In the present case, plaintiffs' current problem is that the lifts could not be operated independently, even with a key. Even with the fixed key system in place, Levine and Zames were both unable to take either lift from the sidewalk level to the plaza level without asking a doorman for assistance. Hanrahan was able to take a lift from the plaza to the sidewalk level without assistance, [*42] but was unable to take either lift from the sidewalk to the plaza. Based on these statements, and without any evidence of unassisted use of the lifts by restaurant patrons in the record, I cannot conclude that the fixed key system is actually facilitating unassisted access as required by the ADA. Therefore, defendant is not entitled to summary judgment on this issue. I express no view at this time as to whether using a fixed key system complies with the 1990 ASME Safety Code.

Because the federal ADA claim has not been dismissed, this court retains jurisdiction over the plaintiffs' claims under state and local law. n6

n6 Defendant does not make any arguments regarding the merits of these claims but rather argues only that if this court dismisses plaintiffs' federal claims, this court would lack subject matter jurisdiction over plaintiffs' state and local law claims. (Def.'s Mem. at 23)

III.

Defendant moves to dismiss, pursuant to *Fed. R. Civ. P. 12(b)(6) and/or 12(c)*, plaintiffs' claim that other ADA violations [*43] exist at the Trump Building. The only specific violation plaintiffs describe in their complaint is that the lifts at the Building bar independent access for wheelchair and scooter users. (Compl. P 8) The complaint states that "on information and belief, Defendants maintain other policies, practices, and structural impediments to accessibility which discriminate against the disabled, and Defendants have made alterations to their facilities in a manner that does not comply with the accessibility requirements of the ADA." (Compl. P 9 (citing *28 C.F.R. pt. 36 App. A*; *42 U.S.C. § 12183(a)(2)*; *28 C.F.R. § 36.402, 36.404*))

Plaintiffs describe in their memorandum in opposition to defendant's motion violations that they claim exist or may exist. In particular, they argue that large, lever-like keys are required in the lifts, signage must be placed on the lifts to identify them, and signage must be placed also at the entrances to the Building to direct wheelchair users to the lifts. (Pls.' Mem. at 7) Plaintiffs argue that unless defendant show it is "technically infeasible" to do so, defendant must place a lift on the east side entrance to [*44] the Trump Building and also integrate a lift into the main entrance on the west side of the building. Finally, plaintiffs argue that if any of the entrances to the Building before it was renovated were accessible by ramp or elevator, then the alterations would violate the ADA because they would have decreased the accessibility of the building. Plaintiffs argue that they need to conduct discovery in order to see whether the use of the lifts is permissible under the ADA.

[HN22] "A claim for relief 'may not be amended by the briefs in opposition to a motion to dismiss.'" *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 836 (S.D.N.Y. 1988)* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984))*. Plaintiffs have not moved to amend their complaint to add these factual allegations regarding particular violations, and they cannot do so through their memorandum. In considering this motion to dismiss, I am limited to consideration of the factual allegations in the complaint. See *Paulemon v. Tobin, 30 F.3d 307, 308-09 (2d Cir. 1994)*.

Plaintiffs have attached several affidavits to their opposition memorandum, [*45] which provide evidence supporting claims of additional ADA violations at the Trump Building. However, considering matters extrinsic to the pleadings converts a motion to dismiss to a motion for summary judgment. Plaintiffs have not obtained discovery from defendant related to their claims and thus their claims are not ripe for summary adjudication. See *Hellstrom v. U.S. Dept. of Veterans Affairs, 201 F.3d 94,*

97 (2d Cir. 2000). [HN23] If the parties have adequate notice, a motion to dismiss may be converted to a motion for summary judgment if the issues to be resolved on summary judgment are "discrete and dispositive." *AdiPar Ltd. v. PLD Intern. Corp., 2002 U.S. Dist. LEXIS 23375, No. 01 Civ. 0765, 2002 WL 31740622,* at *4 (S.D.N.Y. Dec. 6, 2002); 2 James Wm. Moore et al., Moore's Federal Practice P 12.34[3][a] (3d ed. 1999). This is not such an instance.

Defendant argues that although the pleading standard is a liberal one, bald assertions and conclusions of law do not suffice to defeat a motion to dismiss. (Def.'s Mem. at 5)

[HN24] A plaintiff's statement under *Federal Rule of Civil Procedure 8(a)(2)* "must simply 'give the defendant fair notice of what the plaintiff's claim is and [*46] the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).* Plaintiffs' complaint contains no factual assertions whatsoever regarding what features of the Trump Building, other than the wheelchair lifts, violate the ADA. Plaintiffs' statement did not put defendant on notice as to these "other" violations and therefore the claim is dismissed.

***

For the reasons stated above, defendant's motion for summary judgment as to the wheelchair lift claim is denied, and plaintiffs' claim regarding other violations at the Trump Building is dismissed.

SO ORDERED:

Michael B. Mukasey,

U.S. District Judge

Dated: April 1, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

MARVA JEAN SAUNDERS, et al.,) individually and/or on behalf of other)

persons similarly situated,)
)
Plaintiffs,)
)
v.) Case No. 97-1141-CV-W-FJG
)
FEDERAL INSURANCE COMPANY, et al.,)
)
)
Defendants.)

ORDER

Currently pending before the Court is Chubb's Motion to Dismiss Plaintiffs' Revised Second Amended Complaint (Doc. # 40).

I. BACKGROUND

On April 25, 2002 plaintiffs sought leave to file their proposed Second Amended Complaint in this action, alleging claims under the Fair Housing Act, Sections 1981 and 1982 of the Federal Civil Rights Acts and for the first time, claims under the Missouri Human Rights Act. On September 30, 2002, the Court denied in part and granted in part plaintiffs' request for leave to file their Second Amended Complaint. The Court ruled that plaintiffs could not establish a "direct injury" without showing a "direct contact." (September 30, 2002 Order, p. 4). With regard to plaintiffs' proposed deterrence claims the Court stated that "plaintiffs must at lease prove that they had knowledge of the defendants' discriminatory policies and that through this direct contact with the defendants, the plaintiffs knew that it would be futile to apply for insurance and were

thus deterred." (September 30, 2002 Order, p. 5). Thus, while allowing plaintiffs to file their Second Revised Complaint, plaintiffs were directed to eliminate any indirect injury claims from their revised Complaint. Plaintiffs filed their Revised Second Amended Complaint on October 24, 2002 and defendants now move to dismiss.

Defendants move to dismiss based on the fact that plaintiffs have not alleged direct, concrete and particularized injuries and thus do not have standing to sue.

II. STANDARD

> In order to properly dismiss an action for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must successfully be challenged on its face or on the factual truthfulness of its averments. . . . Distinguishing between a facial and factual challenge is critical to determining how the Court should proceed when resolving a motion to dismiss for lack of subject matter jurisdiction. Under a facial challenge to jurisdiction all of the factual allegations in the plaintiff's complaint are presumed to be true, while under a factual challenge no presumptive truthfulness attaches to the allegations in the complaint. . . . Further, under a factual challenge the district court is afforded the unique power to make factual findings which are decisive of its jurisdiction.

Krohn v. Forsting, 11 F.Supp.2d 1082, 1084 (E.D.Mo. 1998)(internal citations and quotations omitted). In Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990), the Eighth Circuit, quoting the Third Circuit in Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977) discussed factual challenges:

> [b]ecause at issue in a factual 12(b)(1) motion is the trial court's jurisdiction–its very power to hear the case–there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of

> jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Osborn, 918 F.2d at 730, quoting, Mortenson, 549 F.2d at 891.

> If the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue. . . . The motion may be supported with affidavits or other documents. . . . If necessary, the district court can hold a hearing at which witnesses may testify. . . . As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, 'any rational mode of inquiry will do.' . . . Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. . . . The only exception is in instances when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'

Osborn, 918 F.2d at 730, quoting, Crawford v. United States, 796 F.2d 924, 928-929 (7th Cir. 1986).

III. DISCUSSION

Chubb states that there are thirteen plaintiffs named in the Second Revised Amended Complaint. However, from the time this litigation began up until the entry of this Court's September 30, 2002 Order, Chubb states that none of these plaintiffs have ever had any contact with Chubb. Chubb states that ten of the plaintiffs have not alleged either direct contact with Chubb nor any knowledge of Chubb's underwriting policies. Chubb also argues that three plaintiffs with recent contact: Esther Moten, Mischelle Greer and Marva Jean Saunders also do not have standing because their contact with Chubb occurred after the commencement of the litigation. At the time of their depositions, none of these three individuals had sought homeowners insurance from Chubb nor had they had any contact or communication with Chubb. The Second Revised Amended Complaint states in part: "[b]ecause their homes did not meet these

objective underwriting selection criteria, rules, guidelines and policies, it would have been futile for plaintiffs to apply for such coverage as plaintiffs Esther Moten, Mischelle Greer and Marva Saunders all found out when they recently called several independent Chubb agents in Kansas City. Id. at ¶ 24.

Plaintiffs argue in response that standing is determined as of the filing of the Revised Second Amended Complaint (October 24, 2002) and not from the date of the original complaint in Canady (February 14, 1996) or when this lawsuit was filed (August 12, 1997). Plaintiffs argue that standing is to be assessed at the time the Revised Second Amended Complaint, which is being challenged by the instant motion to dismiss, was filed. Additionally, plaintiffs argue that they have all established standing based on their knowledge of the barriers of access to Chubb insurance and their desire for the opportunity to purchase such insurance.

A. Deterrence Claims

Plaintiffs state that in the Second Revised Amended Complaint, they allege that Chubb adopted subjective and objective underwriting criteria that precluded them and the vast majority of homeowners in the community from qualifying for homeowners insurance coverage, thereby making it futile for them to apply for such coverage. They state in ¶ 26 that these subjective and objective underwriting criteria:

> have caused members of the Community, including plaintiffs since at least 1997, who have experienced or otherwise acquired knowledge of those barriers, to conclude that attempts to acquire insurance from Chubb would be futile. Chubb thus has deterred and discouraged these persons from attempting to purchase insurance from Chubb.

Plaintiffs argue that these allegations establish standing under the Court's Order of

September 30, 2002. Plaintiffs argue that in the September 30, 2002 Order the Court stated: “plaintiffs must at least prove that they had knowledge of the defendant’s discriminatory policies and that through this direct contact with the defendants, the plaintiffs knew that it would be futile to apply for insurance and were thus deterred.” Plaintiffs assert that the phrase “this direct contact” can refer only to the prior phrase “that they had knowledge of defendants’ discriminatory policies.” Thus, plaintiffs argue that the Court was saying that actions which give rise to knowledge of the barriers imposed by Chubb constitute a direct contact. Plaintiffs then go on to argue that nothing in the Order requires that the direct contact be with a Chubb agent. They argue that when they were deposed by Chubb’s counsel, through their counsel they had contact with Chubb and have been in contact with Chubb since 1997 on a regular basis. They state that “these contacts include Chubb’s production of documents in the Canady Action that reflect its discriminatory policies and practices with respect to the homeowners insurance. These documents also describe the underwriting selection criteria-both objective and subjective-used by Chubb agents. Through these contacts, each of the 13 plaintiffs has acquired knowledge of Chubb’s discriminatory practices since at least early 1997. ” (Plaintiffs’ Suggestions in Opposition, p. 8).

The Court does not agree. The September 30, 2002 Order stated, “in the instant case, the plaintiffs must at least prove that they had knowledge of the defendants’ discriminatory policies and that through this direct contact with the defendants, the plaintiffs knew that it would be futile to apply for insurance and were thus deterred.” (September 30, 2002 Order, p. 5). Plaintiffs assertion that the phase “this direct

contact" can only refer to the prior phrase "that they had knowledge of defendants' discriminatory policies" is nonsensical. The Court meant that plaintiffs in order to assert a deterrence claim must show that they individually had direct contact with the defendants. Not that actions could give rise to knowledge of the barriers. Plaintiffs also make the argument that somehow they could gain this knowledge through contact with Chubb's counsel or through production of documents. This is not what the September 30, 2002 Order stated or what the Court meant. Plaintiffs must show knowledge of the alleged discriminatory policies *through* direct contact with the defendants. The Court does not find that plaintiffs have done so in this case. Accordingly, all of the deterrence claims are hereby **DISMISSED WITH PREJUDICE**.

B. Direct Contact Claims

Three of the plaintiffs attempt to show that they had direct contact by alleging that they recently called several independent Chubb insurance agents in Kansas City. However, beyond this bare allegation there are no details provided as to whom they called at these various agencies, when the contacts were made, what questions were asked and what the responses were from the agents. The Court finds these allegations to speculative to support any showing of direct contact. Additionally, as the Court noted in Perry v. Village of Arlington Heights, 186 F.3d 826 (7th Cir. 1999), where the plaintiff admitted in his deposition that he rented an apartment in the City and obtained title to a car solely to establish standing, "[i]t is not enough for Perry to attempt to satisfy the requirements of standing as the case progresses. The requirements of standing must be satisfied from the outset and in this case, they were not." Id. at 830. The Court does

not find the case of Morlan v. Universal Guaranty Life Insur. Co., 298 F.3d 609 (7th Cir. 2002), cert. denied, 537 U.S. 1160 (2003), cited by plaintiffs to be to the contrary. In that case, a debtor brought a prepetition class action against some insurance companies. Before the class was certified the debtor filed for bankruptcy and eventually obtained a discharge. The debtor then filed an amended complaint and the case was certified as a class action. That case dealt with the issue whether after the bankruptcy proceedings were dismissed, the dismissal revested plaintiff with his previous claim. The language which plaintiffs in this case deem significant is the statement by the Court that "the filing of the amended complaint was the equivalent of filing a new suit, and so it wouldn't matter had there been no jurisdiction over [plaintiff's] original suit. . . ." Id. at 617. The Court finds that facts in the instant case to be distinct from those in Morlan. The Court in its September 30, 2002 Order did not give plaintiffs leave to start all over again. These cases have been pending for over six years. Plaintiffs cannot at this late stage in the proceedings attempt to create direct contact where none previously existed. Therefore, the Court hereby **DISMISSES WITH PREJUDICE** the claims of Esther Moten, Mischelle Greer and Marva Saunders.

III. CONCLUSION

Therefore, for the reasons stated above all of the deterrence claims as well as the claims of plaintiffs Moten, Greer and Saunders are hereby **DISMISSED WITH PREJUDICE**.

Date: March 26, 2004
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge